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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY DEWAYNE BROWN,

Defendant and Appellant.

B288642

(Los Angeles County
Super. Ct. No. NA106986)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Mark C. Kim, Judge. Affirmed.

Stephanie L. Gunther, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Paul M. Roadarmel, Jr. and Charles J. Sarosy,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Gary Dewayne Brown (defendant) appeals his judgment of conviction, challenging the sufficiency of the evidence to establish that an admitted prior Oregon conviction constituted a strike under the Three Strikes law, as well as the absence of a sua sponte unanimity instruction regarding the charge of failure to register as a sex offender. Finding no merit to defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was charged in count 1 with corporal injury of a spouse or cohabitant in violation of Penal Code section 273.5, subdivision (a),¹ and in count 2 with a felony transient failure to register following a move to a residence in violation of section 290.011, subdivision (b). It was further alleged that defendant had suffered three prior felony convictions for which he served prison terms, within the meaning of section 667.5. For purposes of sentencing under the Three Strikes law (§ 667, subds. (b)-(j), § 1170.12), the information alleged that defendant had suffered three prior serious or violent felony convictions, including a burglary conviction in Oregon.

A jury found defendant guilty as charged. In a bifurcated proceeding, defendant waived his right to a trial on the alleged prior strike, a conviction of first degree burglary in violation of Oregon Revised Statutes, section 164.225, in case No. 03CR0843 (the Oregon case). On January 17, 2018, the trial court sentenced defendant to a total prison term of seven years four months, comprised of the middle term of three years on count 1, doubled to six years as a second strike, plus eight months (one-third the middle term of 24 months) on count 2, doubled to 16

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

months. Mandatory fines and fees were imposed and combined actual and conduct credits for a total of 336 days were applied.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

In 2017, Nikki B. (Nikki) was living in an apartment on Cedar Avenue in Long Beach with her two young sons and Shirley Udey (Udey), their grandmother and Nikki's mother-in-law. Nikki claimed that for about two months prior to July 8, 2017, defendant visited her there an average of twice a week, but he did not live with them, had no key or belongings there, and was never present in her absence. Nikki also denied any intimate or romantic involvement with defendant, claiming that they were just friends. She also initially denied that they had a prostitute/pimp relationship, but admitted it later in her testimony. Nikki denied that defendant had hit her or choked her, and said "no hands were put on me like that." Instead she claimed that she was angry and hysterical because she had just learned that Udey had sought sole custody of Nikki's children, and defendant put his arm around Nikki in an attempt to calm her down.²

Udey testified that she saw defendant at the Cedar Avenue apartment almost daily, day and night, beginning in May 2017 until July 8, 2017. Defendant had a key to the apartment but did not receive mail there. Udey heard them having sex in Nikki's

² Nikki was a reluctant witness who during her testimony became angry, attempted to leave the witness stand without consent, and tried to claim a right to remain silent under the Fifth Amendment. Much of her testimony was internally inconsistent or contradicted by other witnesses. The court convened a contempt hearing midway through her testimony, but ultimately accepted her apology and did not find her in contempt.

room, while Udey was in the living room. On July 8, 2017, defendant and Nikki were in her room while Udey was in the living room. The two children were in their room playing. Udey heard Nikki and defendant arguing, went to the door to listen and heard Nikki say, "No, ouch," as well as rustling noises and then choking or gurgling sounds. Udey forced the door open and saw Nikki with tousled hair and red marks on her neck, but no blood on her face. Udey called 911. A recording of the call was played for the jury. Udey told the 911 operator that defendant stayed there on and off, she provided a description of defendant and his car, a silver Jaguar, and said that her daughter-in-law told her to call the police. Nikki and defendant left the apartment, and soon thereafter the police arrived and took defendant into custody. It was then that Udey saw blood all over Nikki's face.

Long Beach Police Officer Eric Gorski testified that he responded to the 911 call, and as soon as he arrived at the Cedar Avenue address, he heard a commotion and saw a woman, later identified as Nikki, running toward the east gate, her face bleeding. Officer Gorski then saw a man, later identified as defendant, chasing and trying to grab her. Nikki told Officer Gorski that she and defendant argued, that they had been dating approximately two months, and that defendant had been living with her for four weeks. During the argument defendant held her from behind and squeezed her neck for approximately 10 seconds with half his strength. She got free and ran outside where defendant punched her once in the mouth with his right fist. Defendant had no visible injuries.

Bruce Burlingame, custodian of sex offender registration records in Long Beach, testified that a sex offender with a permanent residence must register at the police department every year, five days before or after his birthday, while a

transient must register every month, giving all addresses or locations where he slept or frequented. If the transient moves into a home, he must register within five days as a resident. From March 2016 through July 2017, defendant registered as a transient, missing just one month, July 2016, in that period. Defendant's registration form for June 20, 2017, lists him as a transient and his location as Pacific Avenue and 5th Street. Defendant's next registration was July 24, 2017, after the altercation with Nikki, and he once again listed his location as Pacific Avenue and 5th Street. Defendant never registered or mentioned the Cedar Avenue address. A registrant is also required to provide information regarding any vehicle he drives or owns, but defendant gave no information regarding the silver Jaguar.

DISCUSSION

I. The Oregon case

It was alleged that prior to the commission of the current offenses, defendant had been convicted of a serious or violent felony in Oregon, "as defined in [] section 667(d) and [] section 1170.12(b), and . . . thus subject to sentencing pursuant to the provisions of [] section 667(b)-(j) and [] section 1170.12." Defendant acknowledges having admitted his Oregon conviction of first degree burglary as alleged in the information, but contends that the second strike punishment imposed must nevertheless be reversed because the record contains insufficient evidence to prove that the conviction qualified as a serious or violent felony within the meaning of section 667, subdivision (d).

A prior conviction in another jurisdiction qualifies as a strike offense "if [it] is for an offense that includes all of the elements of the particular violent felony as defined in subdivision (c) of Section 667.5 or serious felony as defined in subdivision (c) of Section 1192.7." (§ 1170.12, subd. (b)(2).) Both parties agree

the Oregon burglary statute does not include all the elements of the California burglary statute, as it requires only an entry with intent to commit a crime, whereas the California statute requires entry with intent to commit theft or any felony. (See §§ 459, 460; ORS §§ 164.215, 164.225(1).) Thus, it is *possible* that a burglary conviction in Oregon can be “for conduct which, if committed in California, would not support a conviction under section 459.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1144.)

As defendant acknowledges, the effect of admitting an enhancement is similar to the effect of a guilty plea. (See *People v. Maultsby* (2012) 53 Cal.4th 296, 302; *People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785.) Thus, defendant’s admission “concedes that the prosecution possesses legally admissible evidence sufficient to prove [the enhancement] beyond a reasonable doubt.’ [Citation.] [It] waives any right to raise questions regarding the evidence, including its sufficiency [Citation.]” (*People v. Egbert* (1997) 59 Cal.App.4th 503, 509; see *People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.)

The record leaves no doubt that defendant knew and intended to admit the Oregon burglary as a strike for purposes of the Three Strikes law. During jury deliberations, after conferring with defendant, defense counsel stated that he had explained three options to defendant, and defendant chose to admit his “out-of-state first degree burglary.” The court asked whether defendant would be admitting the “strike prior” which the court described as the burglary charge in case No. 03CR0843. Defense counsel did not object to the court’s description, and when the court asked defendant directly whether he wanted to admit the prior conviction, defendant answered, “Yes.” After defendant was informed of and waived his trial rights, the court inquired, “It’s alleged that you suffered the following conviction pursuant to Penal Code section 1170.12(d), that would be case number

03CR0843, conviction August 29, 2003, Coos County, State of Oregon, for first degree burglary, do you admit or deny that conviction?” Defendant replied, “Admit.”

Counsel stipulated to a factual basis, and the court found that defendant had waived his rights knowingly and intelligently, and based upon counsel’s stipulation, that there was a factual basis for the admission. Under these circumstances, the trial court was not required to cite evidence of the nature of the prior offense or refer to the underlying conduct. (See *People v. Palmer* (2013) 58 Cal.4th 110, 114, 118.) We conclude that defendant’s admission that he had been convicted in Oregon of burglary, as a “strike prior” thus precludes his substantial evidence challenge.

Defendant disagrees. He quotes *People v. Crowson* (1983) 33 Cal.3d 623, 627, fn. 3, which cites *In re Finley* (1968) 68 Cal.2d 389, 390-391, and *In re McVickers* (1946) 29 Cal.2d 264, 270-273, for the proposition that an admission to a prior conviction “does not preclude a defendant from later demonstrating that the increased punishment which he received is unwarranted because his prior conviction does not fall within the class of convictions for which the statute authorizes such punishment. [Citations.]’ [Citation.]” A defendant may challenge a prior foreign conviction which he admitted if it *affirmatively appears* in the record that it would not as qualify an enhancing offense in California. (See *People v. Guerrero* (1988) 44 Cal.3d 343, 351-353.) In *Crowson*, the appellate record was adequate to challenge the class of the prior conviction on appeal, and in *Finley* and *McVickers*, the issue was raised in habeas proceedings. The record in this case does not affirmatively demonstrate that the Oregon conviction does not qualify as a strike offense; thus, defendant’s substantial evidence challenge is not appropriate here.

II. Effective assistance of counsel

Defendant contends that “trial counsel was ineffective in failing to properly research the validity of the prior conviction allegation.” “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” (*Strickland v. Washington* (1984) 466 U.S. 668, 690.) It is thus defendant’s burden to demonstrate prejudicial counsel error. (*Id.* at p. 694.) Defendant fails to cite to anything in the record which might indicate that defense counsel failed to research the validity of the Oregon conviction as a strike under California requirements, that counsel failed to explain such requirements to defendant, or that counsel was mistaken in believing that the conviction qualified as a strike offense. He must therefore make his claim in a petition for habeas corpus. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

III. Unanimity instruction

Defendant contends that there was evidence of three instances of failing to register as a sex offender on which the jury could have based its verdict, and that the prosecutor failed to elect one of them. He concludes that the trial court thus erred in failing to give a unanimity instruction sua sponte. The three acts described by defendant were (1) the failure to register the Cedar Avenue address as his residence in 2017, (2) one missed transient registration date in July 2016, and (3) a failure to register the silver Jaguar he was seen driving.

“As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty.

[Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 679.) This means that a unanimity instruction or an election by the prosecutor is required “[w]here the jury receives evidence of more than one factual basis for a conviction [Citations.]” (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) As we will explain, neither the evidence of one month’s failure to register as a transient, nor the evidence of failure to provide the license plate of a vehicle provide a factual basis for the charged offense of failing to register the Cedar Avenue address as a residence.

Initially, we observe that the prosecution did, in fact, select the particular act upon which it relied, by charging defendant with the first of defendant’s three described acts. The information alleged a violation of section 290.011, subdivision (b), which provides: “(b) A transient who moves to a residence shall have *five working days* within which to register at that address, in accordance with subdivision (b) of Section 290.” (Italics added.)

Unlike the charged failure to register a residence, the requirement of *monthly* transient registrations is found in section 290.011, subdivision (a), not section 290.011, subdivision (b). The prosecution did not elect to charge defendant with a violation of subdivision (a) due to his July 2016 failure to comply with a single monthly transient registration.

The third act described by defendant was the failure to provide information about his silver Jaguar. A person who is required by section 290 to register must provide the information enumerated in section 290.015, subdivision (a), which includes “(3) The license plate number of any vehicle owned by, regularly driven by, or registered in the name of the person.” In addition to other penalties, the failure to provide such information is punishable as a misdemeanor, which the prosecutor did not elect to charge. (See § 290.018, subd. (k).)

The trial court's instructions to the jury were clear that the offense charged was failure to register the Cedar Avenue address as a place of residence. At the outset of trial, the trial court read to the prospective jurors the substance of count 2 of the information, in relevant part as follows: "[O]n or about July 8, 2017 . . . , the crime of transient failure to register after moving to a residence with a prior 290 conviction in violation of Penal Code section 290.01(b) [*sic*],³ a felony, was committed by [defendant]." Later, the trial court read CALCRIM jury instruction No. 1170, modified to include the following: "To prove that the defendant is guilty of this crime, the People must prove that . . . [t]he defendant actually knew he had a duty under Penal Code section 290 to register as a sex offender living at [the Cedar Avenue address], and that he had to register within five working days of changing his residence." On the other hand, the jury was not instructed regarding a missed monthly registration or the failure to provide vehicle information, and no instruction mentioned section 290.015, subdivision (a), of section 290.011, subdivision (a), omitting information about a vehicle, or missing a monthly registration.

In sum, given the different factual bases to convict defendant of the three incidents described by defendant, neither the failure to provide vehicle information nor the omission of one monthly transient registration in 2016 "could constitute the crime charged," such that a unanimity instruction would have been required. (*People v. Jennings, supra*, 50 Cal.4th at p. 679.)

Assuming nevertheless that an election was required, we reject defendant's argument that the prosecutor's failure to tie count 2 to the requirement of registering the Cedar Avenue

³ Either the court misspoke or this was a typographical error, as the violation alleged in the information was for section 290.011, subdivision (b). Section 290.01 has no application here.

address is demonstrated by his opening and closing statements and by his soliciting testimony regarding the two uncharged incidents. The prosecutor connected count 2 to the failure to register the Cedar Avenue address and he did not suggest to the jury that it could find guilt based upon the 2016 skipped monthly transient registration or the failure to provide information regarding the Jaguar. Burlingame's very short mention of the uncharged incidents cannot be found to suggest a link to the charged conduct. Finally, in closing argument, the prosecutor's only use of defendant's failure to register his car was to argue that he could not be believed: "He is just lying about the situation. He is lying about where he is. He's lying about the fact that he has a car." We found no reference in the prosecutor's argument regarding the missed monthly registration in 2016. On the other hand, the prosecutor devoted approximately one-third his summation, four pages or reporter's transcript, to the charged offense of failing to register the Cedar Avenue address.

Defense counsel amply demonstrated his certainty over which conduct constituted the offense in count 2. He introduced the subject in closing argument with, "Now, the residence thing on count 2, did these two people live together?" Counsel argued at length that defendant did not live at the Cedar Avenue address. He also referred the jury to CALCRIM No. 1170, which referred specifically to the charge that defendant did not register the Cedar Avenue address.

Moreover, defendant's only proffered defense to the charged registration offense was a denial that he resided at the Cedar Avenue address. Thus neither an election nor a unanimity instruction was required, as "the jury's verdict implies that it did not believe the only defense offered." (*People v. Riel* (2000) 22 Cal.4th 1153, 1199-1200.)

We conclude that no unanimity instruction was required, and that under the circumstances, that such an instruction would be inappropriate as it could very well have confused the jury. (See *People v. Schultz* (1987) 192 Cal.App.3d 535, 539.) We also conclude that there was no reasonable probability that any jury would have been misled into believing that count 2 was based upon the two uncharged incidents. “Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions. [Citation.]” (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We thus presume the jury found defendant guilty of count 2 only after finding that the prosecutor proved beyond a reasonable doubt that defendant knew that he was required to register at the Cedar Avenue address and that he failed to do so within five days after moving to a residence, as instructed.

Indeed, the verdict form confirms that the jury followed its instructions, and it states in relevant part: “We, the jury . . . find [defendant] **guilty** of the crime of TRANSIENT FAILURE TO REGISTER *AFTER MOVING TO RESIDENCE* . . . in violation of Penal Code section 290.011(b), a Felony, as charged in Count 2 of the Information.” (Italics added.) The verdict form made no mention of section 290.015, subdivision (a), of section 290.011, subdivision (a), of omitting information about a vehicle, or of missing a monthly registration.

For all the reasons discussed above, we also conclude beyond a reasonable doubt that any error from the omission of a unanimity instruction was harmless.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST